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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74 859

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, [redacted],

Appellants,

v.

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT CONVENED IN THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1974

No. 74

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

v.

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT CONVENED IN THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants Curtis and Continental appeal from a final judgment of the United States District Court for the Southern District of New York entered on November 6, 1974, which *inter alia* declared unconstitutional portions of the New York Attachment Statute. The Attorney General of the State of New York is filing a separate Jurisdictional Statement on behalf of all other appellants. Appendix references made herein refer to the Appendix to the Jurisdictional Statement of the Attorney General.

The Opinions Below

The opinion convening the three-judge court is reported at 377 F.Supp. 1055 and appears as Appendix B (15a). The opinion of the three-judge court is not yet reported. It appears as Appendix A (1a).

Statement of the Grounds on Which the Jurisdiction of this Court is Invoked

(i) This action was brought by Appellees pursuant to the Civil Rights Act, 42 U.S.C. 1983, challenging the constitutionality of portions of the New York Attachment Statute, New York Civil Practice Law and Rules, Section 6201, Subparagraphs (4), (5) and (8) and Section 6211 and seeking injunctive and declaratory relief.

(ii) The judgment sought to be reviewed is dated November 1, 1974 and was entered on November 6, 1974. It appears as Appendix C (31a). No petition to rehear was filed. The Notices of Appeal were filed on November 27 and 29, 1974 in the United States District Court, Southern District of New York and appear as Appendices D and E (33a, 35a).

(iii) Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. 1253.

The Statute Involved

The validity of New York Civil Practice Law and Rules, Article 62, Section 6201, Subparagraphs (4), (5) and (8) and Section 6211 is here involved. The text of Article 62 appears as Appendix F (37a). The official edition where said statute may be found is *McKinney's Consolidated Laws of New York,* Book 7B (10th Volume), page 31 through page 123.

Questions Presented by the Appeal

The following questions are presented by this appeal:

1. Does a state statute meet the test of due process when it (a) conditions the issuance of an *ex parte* attachment upon (i) a factual *prima facie* showing of the grounds therefor to a judge and (ii) the posting of a bond to indemnify the defendant against legal costs and damages, and (b) provides the defendant the immediate right to vacate such attachment either (i) by posting a bond or (ii) by an adversary hearing in which plaintiff's *prima facie* showing is tested and the burden of rebutting such *prima facie* showing shifts to the defendant?

2. Does such a statute meet the test of due process to the extent it permits attachment of property in which the plaintiff does not have a vendor's lien or a similar statutory lien?

3. Does such a statute meet the test of due process to the extent that the grounds for attachment are based upon fraud?

4. Does such a statute meet the test of due process to the extent that the ground for attachment is based upon dissipation, secretion or removal from the reach of the plaintiff of assets required to satisfy a judgment?

Statement of Facts of the Case

In August 1971, Appellant Curtis Circulation Company (hereinafter "Curtis") entered into a written distribution agreement with Appellee Bert Randolph Sugar (hereinafter "Sugar") and a corporation which he then designated "Champion Sports, Inc.", but which in fact it later turned out was a non-existing corporation. Sugar used a number of corporate name variations containing "Champion" but

it later turned out there was only one corporation bearing that name, to wit, Champion Sports Publishing Inc. (hereinafter "Champion"). Sugar and Champion were publishers of a number of periodicals and Curtis was, and is, engaged in the business of distributing periodicals throughout the United States and abroad. Curtis undertook to distribute a number of designated periodical titles for Champion. By the terms of the agreement Curtis advanced substantial sums of money to Champion and the agreement provided that Curtis could recoup such advances from sales of subsequent issues of the periodicals which it agreed to distribute for Champion. The agreement was for a term of five years.

Sometime prior to April 13, 1973, at a time when Curtis was owed substantial moneys advanced to Champion and the contract still had more than three years to run, it came to the attention of Curtis that without notice to it, all of the periodicals which were the subject of the distribution agreement had purportedly been sold to third parties. The purported seller was a corporation known as Wrestling Revue, Inc. (hereinafter "Wrestling"). One of the purported vendees was a Canadian corporation.

Upon further investigation, Curtis ascertained that no consideration had been paid to Champion for such purported sales but that the consideration therefor had been paid or was payable to Wrestling. Curtis also determined that the controlling stockholder of Wrestling as well as Champion was Sugar and that representations had been made to the vendees of the periodicals which were the subject of the distribution agreement that Champion had never really been the owner of such periodicals but that it had a mere license to publish the same which had been issued by Wrestling, the claimed owner.

Neither the alleged license nor the alleged ownership by Wrestling had ever been disclosed to Curtis, if such representations were indeed true, and Sugar had repre-

sented to Curtis that he through Champion was the owner of such periodicals. It became apparent to Curtis that Sugar had either engaged in fraud at the inception of the distribution agreement and/or had entered into a fraudulent scheme thereafter, using Wrestling and Champion, two corporations controlled by him, and purported licenses running from Wrestling to Champion, for the illegal purpose of effectually avoiding the distribution agreement, depriving Champion of all of its assets, and depriving Curtis of the security to which it was entitled under the distribution agreement, *viz,* the ability to recoup advances from future issues of periodicals owned by Champion and distributed by Curtis.

When Sugar and Champion, through their attorneys, were confronted with the facts uncovered in the Curtis investigation, they would give no satisfactory explanation or make any arrangements to pay, or secure payment, to Curtis of the moneys already advanced. As the periodicals had already been removed from Champion and consideration therefor, to the extent it already had not been paid, would flow to Sugar through Wrestling, Curtis had to act promptly to arrest the continued flow and dissipation of assets belonging to Champion to which Curtis was entitled to look as a matter of law and particularly under its distribution agreement with Champion and Sugar.

Sometime prior to April 13, 1973 Curtis applied to a Justice of the New York Supreme Court, New York County, for an order of attachment pursuant to CPLR § 6201, Subparagraphs (4), (5) and (8). Pursuant to the statute, CPLR 6212, Curtis submitted an evidentiary showing by affidavit and documents of the grounds for the attachment, particularly showing the facts described herein and also submitted the required statutory bond. The application was made *ex parte.* One of the attorneys for Curtis appeared before Appellant Justice Sidney A. Fine who reviewed the papers and interrogated said attorney

and thereafter issued an order of attachment on April 13, 1973. The application was made on three alternative grounds all involving elements of fraud and deceit. One ground was based on CPLR 6201, Subparagraph (4):

> "the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts."

The second ground was based on Subparagraph (5):

> "the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability."

The third ground was based on Subparagraph (8):

> "there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit."

The application of Curtis was also accompanied by a verified complaint stating, *inter alia,* a cause of action for fraud and deceit, the evidentiary facts of which were presented in the affidavit submitted upon the application for the attachment as required by New York law.

On April 16, 1973, the Sheriff of the City of New York made a levy upon the moneys held by National Sports Publishing Corporation, which were the purported consideration for purported sales to it by Wrestling of periodicals which were the subject of the distribution agreement between Curtis and Champion.

On January 3, 1974, Appellees herein commenced this action in the United States District Court, Southern District of New York, to enjoin the enforcement of the statute under which such attachment was issued and for a declaration of the unconstitutionality of such statute. At the time that this action was commenced, the state action in

which the attachment had issued had been pending since April 13, 1973. The summons and complaint were served on April 18, 1973 and issue was joined on April 27, 1973. Pretrial discovery proceedings were in progress. Appellees never challenged the attachment in the state court.

On October 17, 1974, the three judge court convened to hear and determine Appellees' constitutional challenge rendered its opinion in which it declared to be unconstitutional New York Civil Practice Act and Rules §§ 6201 Subparagraphs (4), (5) and (8) and 6211.

Judgment granting a permanent injunction against enforcement of the statute and declaring the same to be unconstitutional was rendered by the court under date of November 1, 1974 and such judgment was entered with the clerk of said District Court on November 6, 1974. The judgment included a stay of the operation of the judgment until determination by, or order of, this court.

The Questions Presented are Substantial and Require Plenary Consideration

While this Court has on several occasions reviewed generally whether statutes providing for prejudgment seizures of property afford due process, this appeal squarely presents a number of substantial issues which have not previously been reviewed or determined by this Court.

In *Ownbey* v. *Morgan*, 256 U.S. 94 (1921), *Coffin Brothers & Co.* v. *Bennett*, 277 U.S. 29 (1928) and *McKay* v. *McInnes*, 279 U.S. 820 (1929), this Court upheld the constitutionality of *ex parte* attachments where the application for the same was not supported by any affidavit or the posting of a bond and where the defendant's right to a hearing was postponed to the plenary trial of the action.

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), this Court, while recognizing that due process does

not generally require prior notice and hearing for prejudgment seizure of property, held that prior notice and hearing might be required in specific instances and found that the wage garnishment under review was such a specific case. In *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), this Court indicated that prior notice and hearing might generally be required altho it recognized a number of instances in which it was not required. In *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600 (1974), this Court reaffirmed that prior notice and hearing was not required, at least if the procedural safeguards attending an *ex parte* order and following its issuance reached a constitutional accommodation of the conflicting interests of the parties.

While the Court below found substantial parallels between the Louisiana statute reviewed in *Mitchell* and the New York statute, it relied upon three grounds which it found to distinguish the case under review from *Mitchell.* First, it interpreted the New York law as placing the burden of proof on the defendant at the preliminary hearing. Second, it found that due process was not satisfied absent a statutory requirement that the plaintiff have a possessory lien. Third, it found that prejudgment attachments grounded on fraud violate due process as fraud issues are not amenable to easy proof on a preliminary hearing. The lower court's reliance on each of these distinctions raises substantial issues on this appeal.

1. There is a Substantial Question Whether a Preliminary Hearing Which Tests the *Prima Facie* Showing of Plaintiff and Shifts the Burden of Rebuttal to Defendant Satisfies Due Process.

While some had read *Fuentes* as a departure from the prior holdings of this Court that *ex parte* prejudgment seizures were consistent with due process, *Mitchell* clearly reaffirmed such prior holdings.

The Complaint in this action attacked the constitutionality of the New York attachment statute solely on the

ground that the order of attachment issued *ex parte*, relying upon Appellees' interpretation of the holding in *Fuentes*. The decision in *Mitchell* was rendered after the action was commenced. Consequently, the Appellees shifted their attack upon the New York statute, urging upon the lower court the proposition that the preliminary hearing in New York is distinguishable from the hearing afforded under the Louisiana statute reviewed in *Mitchell* in that it places the burden of proof upon the defendant and consequently it does not meet the test of due process. Although the argument misapprehends the New York statute and case authorities (see *infra*), it was accepted by the lower court.

Thus, while the lower court found unconstitutional only such portions of the New York statute as provided for *ex parte* attachments grounded on fraud, the *rationale* of the main ground of the decision below, that the preliminary hearing is deficient, would seem to render unconstitutional all New York attachments, whatever the grounds and regardless whether hearing is had before or after the order issues.[1]

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[1] As the writ issued in this case was in fact *ex parte*, the decision of the court below did not require consideration of writs issued under the same sections (grounded on fraud) after notice and hearing. However, the wider implications of the decision have already caused some strange and conflicting consequences in the New York State Courts. For instance, it was announced in the New York Law Journal of October 31, 1974, p. 1, col. 6, that the New York Civil Court (a state court of limited jurisdiction in the City of New York) would continue to issue *ex parte* attachments provided that the *ex parte* order contained provision that within three days after levy by a sheriff, the plaintiff would move on notice to the defendant to justify the grounds of the attachment and upon such motion, the plaintiff would have the burden of proof. This procedure is applicable to attachment sought on all grounds under Article 62 including, e.g., jurisdictional grounds. By contrast, the State Supreme Court, New York County (also a court of first impression but without limited jurisdiction) has discontinued the issuance of *ex parte* attachments in cases grounded on fraud. See, New York Law Journal, November 19, 1974, page 4, col. 8. Hence, the Civil

(footnote continued on following page)

Hence, one of the issues squarely presented on this appeal is whether a preliminary hearing which tests the *prima facie* showing of the plaintiff and shifts the burden of rebuttal of such *prima facie* showing to defendant satisfies due process.

The issue is so stated by reason of the fact that CPLR 6212 imposes upon the plaintiff the initial burden of proving by evidentiary facts and documents that he is entitled to the order of attachment. The New York courts have held that upon an application for an order of attachment the plaintiff has the burden of proving by evidentiary facts and documents a *prima facie* case sustaining his cause of action and the grounds for attachment. *Durkin* v. *Paten,* 97 App. Div. 139, 89 N.Y.S. 622 (1904); *J. H. Mohlman Co.* v. *Landwehr,* 87 App. Div. 83, 83 N.Y.S. 1073 (1903); *Hill* v. *Atanasio* (N.O.R.), 127 N.Y.S. 344 (1911); *Ecco High Frequency Corp.* v. *Amtorg Trading Corp.* (N.O.R.), 81 N.Y.S.2d 610 (1948), aff'd 274 App. Div. 982, 85 N.Y.S.2d 304; *Banco Agricola* v. *Jiminez Export* (N.O.R.), 97 N.Y.S.2d 437 (1950); *Favta Societe Anonyme* v. *United Kingdom Machinery Corp.,* 10 Misc.2d 326, 167 N.Y.S.2d 287 (1957); see: *Anderson* v. *Malley,* 191 App.Div. 573, 181 N.Y.S. 729 (1920); *Abdun-Nur* v. *Arbeed,* 198 App.Div. 795, 191 N.Y.S. 38 (1921); *Makepiece* v. *Dilltown Smoke-*

(footnote continued from preceding page)
Court appears to be satisfied that under the decision of the court below *ex parte* orders per se are not obnoxious but that said court's finding that the defendant has the burden of proof is obnoxious. Of course, the Civil Court's new procedures do not take into account the other grounds of the decision of the court below, viz., the absence of a vendor's lien and the unsuitability of proof of fraud at a preliminary hearing. The new procedure of the Supreme Court, New York County, not only fails to take these latter items into account, but makes no provision whatsoever with respect to the nature of the hearing to which the defendant will be entitled where orders of attachment grounded on fraud are issued after notice. It appears that the lower court's decision has created more issues than it has resolved.

less Coal Co., 179 App.Div. 622, 167 N.Y.S. 83 (1917); *Gitlin* v. *Stone*, 262 F.Supp. 500 (1967).

The New York decisions relied upon by the court below for its finding that the burden of proof is on defendant in the preliminary hearing on a motion to vacate the attachment are not inconsisent.[2] As all of the cited decisions, both those cited herein and those cited in the opinion of the court below, were decided on defendant's motion to vacate an *ex parte* attachment issued on proofs already submitted by plaintiff, the New York decisions relied upon by the court below stand only for the proposition that the plaintiff having carried the burden of demonstrating the

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[2] The lower court's conclusion that the burden of proof in New York is on the defendant is founded upon subsidiary conclusions which are demonstrably in error. Thus the lower court found that the sole ground for vacating an attachment in New York is "that the attachment is unnecessary to the security of the plaintiff." This is clearly erroneous as the statutory language itself (CPLR § 6223) demonstrates the quoted ground to be an *additional* and *alternative* ground, not an exclusive one. The entire sentence in which the language occurs makes it plain that this additional ground is designed primarily for a defendant who submits himself to the personal jurisdiction of the court after an action has been started by attachment primarily to obtain *in rem* jurisdiction. While the lower court's decision states that the quoted language has been interpreted by the New York courts for some fifty years, the fact of the matter is that the language was only added to the section some twelve years ago when the then New York Civil Practice Act was repealed and replaced by the present New York Civil Practice Law and Rules. See, *Supplementary Practice Commentary, McKinneys,* CPLR 6223, Cumulative Pocket Part p. 47 and p. 106 of the main volume citing the *Legislative Studies and Reports* covering the addition of this provision. All of the New York decisions cited by the lower court were decided before the language ever appeared in the statute except those cases cited which deal specifically with a motion to vacate *only* on the ground "that the attachment is unnecessary to the security of the plaintiff". Finally, the statement in the New York decisions cited by the lower court that the defendant has the burden of proof must be taken in the context that the statute imposes upon the plaintiff in the first instance the burden of proving a *prima facie* case entitling him to attachment. See main text.

grounds for attachment in the first instance, on the motion to vacate, the burden shifts to the defendant.[3]

The fact that the burden of proof in New York is on the plaintiff is easily demonstrable if we view the statutory procedure as applied to an application for attachment made by a plaintiff on prior notice and hearing, a procedure for which the statute provides as well as an *ex parte* application. If the application is made on notice, clearly Rule 6212 imposes upon the plaintiff the burden of proving a *prima facie* case warranting the attachment. The defendant's response can be in the nature of a demurrer, i.e., that no *prima facie* case has been made out, or a rebuttal. The latter approach shifts the burden of going forward to the defendant but only after the plaintiff has already carried his burden. The procedure is no different when the plaintiff makes out his *prima facie* case *ex parte* in the first instance. It is only by artificially fragmenting the *ex parte* procedure that one can successfully appear to argue that the burden on the motion to vacate is that of the defendant. The distinction, if any, is purely formal and semantic; it is not substantive.

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[3] The cases cited in the lower court's opinion which are concerned solely with the "unnecessary security" ground may constitute an exception, i.e., a defendant moving only on this ground may have the burden of going forward in the first instance, a burden which New York requires the plaintiff to bear in all other cases. It would appear that a motion based on the "unnecessary security" ground might require defendant to carry the burden as (a) such a motion is not directed to an attack upon any ground for attachment initially proved by the plaintiff and (b) the facts which would tend to prove that the security is unnecessary, albeit a valid ground for attachment exists, are peculiarly within the knowledge of the defendant, e.g., the extent and availability of assets to satisfy a judgment which might be procured by the plaintiff. In any event: (a) the "unnecessary security" ground is totally irrelevant to the case at bar and (b) this ground is an additional remedy afforded to a New York defendant which is not to be found in the Louisiana statute.

Whether this Court adopts the lower court's formal conclusion that the burden of proof in New York is on defendant or concludes that the burden of proof is on the plaintiff, substantial due process questions are raised by this appeal whether the scope and procedure of the hearing are sufficient.

2. There is a Substantial Question Whether any Prejudgment Seizure of Property in which the Plaintiff does not have a Vendor's Lien or a Similar Statutory Lien can Meet the Test of Due Process Regardless how Protective the Scope and Nature of the Preliminary Hearing are to a Defendant.

In *Mitchell,* this Court enunciated the general proposition that *ex parte* prejudgment seizure orders satisfy due process if the substantive and procedural protections attending such orders reach a constitutional accommodation of the respective interests of the parties. However, the facts considered by the Court in *Mitchell* included the existence of a vendor's lien recognized under the statutes of Louisiana. Dealing with the specific facts before it, the Court in *Mitchell* stated, *inter alia:*

> "The reality is that both seller and buyer had current real interest in the property . . ." 416 U.S. 604.

The decision of the court below has, in effect, required a vendor's lien or at least a similar possessory lien as a *sine qua non* of the constitutionality of a prejudgment seizure. While this is one of the grounds upon which the court below relied for its declaration of the unconstitutionality of *ex parte* orders, its *rationale* would require as well the existence of such a possessory lien for prejudgment seizure orders made after notice and hearing. The *rationale* places under a cloud the constitutionality of all prejudgment seizure orders, *ex parte* or after notice, on

whatever ground, fraud, jurisdiction, etc., where the plaintiff does not hold a possessory lien.[4]

Hence, this appeal clearly presents to this Court a substantial question whether the existence of a possessory lien is a *sine qua non* of due process in prejudgment seizures.

3. There is a Substantial Question Whether any Prejudgment Seizure Grounded on Fraud can Meet the Test of Due Process, Regardless how Protective the Scope and Nature of the Preliminary Hearing are to a Defendant.

Similarly, dealing with the specific facts before it, the Court in *Mitchell* found that "the existence of the debt, the lien and the delinquency . . . are ordinarily uncomplicated matters that lend themselves to documentary proof". 416 U.S. 609.

One of the grounds upon which the lower court based its decision was that fraud issues "are notably unsuitable to determination on documentary proof alone" (11a). The *rationale* of the court below would indicate that orders of attachment grounded on fraud, *ex parte* or after notice and hearing, cannot satisfy due process, regardless the substantive and procedural protections provided. Whether this be the case is a substantial question raised on this appeal.

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[4] While Curtis did not have a possessory lien, its distribution agreement with Champion gave it a specific contractual lien on the publications which were removed from Champion through the alleged sales by Wrestling to two purported vendees. The consideration for one of these purported sales was the only property upon which the sheriff levied. Also, creditors have well recognized interests in conveyances by their debtors without consideration where the debtor is insolvent or unable to make payment. See, e.g., New York Debtor and Creditor Law, § 273, *et seq.*

4. There is a Substantial Question Whether Prejudgment Seizures Grounded upon Dissipation, Secretion or Removal from the Reach of the Plaintiff of Assets Required to Satisfy a Judgment, Meet the Due Process Test.

The decision in *Fuentes,* even if broadly read as holding that prejudgment seizures issued *ex parte* violate due process, nevertheless sets forth some specific exceptions. 407 U.S. 67, 91, 93. One of those exceptions is the issuance of an *ex parte* order "to guard against the demonstrated possibility that the alleged debtor will destroy or conceal disputed goods". The court below found this exception to be inapplicable to the case at hand (fn. 5 to the lower court's decision). There is no indication of the lower court's *rationale* in reaching this determination. One can only conjecture that the lower court reads the words "disputed goods" most narrowly so that other forms of property are not to be considered within the exception enunciated in *Fuentes.* More specifically, the lower court did not view the proceeds of the purported sales of the publications in which Curtis had a contractual security interest as analogous to, or falling within, the "disputed goods" exception enunciated in *Fuentes.*

One of the three subparagraphs of CPLR 6201 upon which the order of attachment was grounded by the state court, subparagraph (4), is that:

> "The defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of those acts."

Hence, the lower court has in effect held that statutes permitting prejudgment seizure based upon a showing that the defendant with fraudulent intent is secreting or disposing of his assets cannot satisfy due process, as no pre-

liminary hearing can be adequate to resolve such issues. If the Court should find that fraud issues generally are not amenable to determination by preliminary hearing, and that attachments generally grounded on fraud are therefore violative of due process, a substantial question is raised on this appeal whether fraudulent disposal or secretion of assets, specifically form the basis for prejudgment seizures satisfying due process.

CONCLUSION

This appeal presents substantial questions regarding the nature and scope of the hearing, the permissible grounds and the extent of the interest in property required for due process in prejudgment seizures. Probable jurisdiction should therefore be noted.

Dated: New York, New York, January 6, 1975.

Respectfully submitted,

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BRIEF FOR THE APPELLANTS CURTIS CIRCULATION COMPANY AND CONTINENTAL CASUALTY COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-859

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

v.

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT CONVENED IN THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS CURTIS CIRCULATION COMPANY AND CONTINENTAL CASUALTY COMPANY

Appellants Curtis and Continental appeal from a final judgment of the United States District Court for the Southern District of New York entered on November 6, 1974, which *inter alia* declared unconstitutional portions of the New York Attachment Statute.

The Opinions Below

The opinion convening the three-judge court is reported at 377 F.Supp. 1055 (Jur.App.B, p. 15a).* The opinion of the three-judge court is reported at 385 F.Supp. 643 (Jur.App.A, p. 1a).

Jurisdiction

Notices of appeal from the judgment entered by the Court below on November 6, 1974 (Jur.App.C, p. 31a) were filed on November 27 and November 29, 1974 in the United States District Court, Southern District of New York (Jur.App.D & E, pp. 33a, 35a). The Jurisdictional Statements were filed in this Court on January 13, 1975. On April 14, 1975, this Court entered an order noting probable jurisdiction. —— U.S. ——. The jurisdiction of this Court rests on 28 U.S.C. 1253.

The Statute Involved

The validity of New York Civil Practice Law and Rules, Article 62, Section 6201, Subparagraphs (4), (5) and (8) and Section 6211 is here involved (Jur.App.F, p. 37a). The official edition where said statute may be found is *McKinney's Consolidated Laws of New York,* Book 7B (10th Volume), page 31 through page 123.

Questions Presented by the Appeal

The following questions are presented by this appeal:

1. Does a state statute meet the test of due process when it (a) conditions the issuance of an *ex parte* attach-

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* References to the Appendix to the Jurisdictional Statement previously filed by the New York Attorney General will be designated "Jur. App."

ment upon (i) a factual *prima facie* showing of the grounds therefor to a judge and (ii) the posting of a bond to indemnify the defendant against legal costs and damages, and (b) provides the defendant the immediate right to vacate such attachment either (i) by posting a bond or (ii) by an adversary hearing in which plaintiff's *prima facie* showing is tested and the burden of rebutting such *prima facie* showing shifts to the defendant?

2. Does such a statute meet the test of due process to the extent it permits attachment of property in which the plaintiff does not have a vendor's lien or a similar statutory lien?

3. Does such a statute meet the test of due process to the extent that the grounds for attachment are based upon fraud?

4. Does such a statute meet the test of due process to the extent that the ground for attachment is based upon dissipation, secretion or removal from the reach of the plaintiff of assets required to satisfy a judgment?

Summary Statement of the Case

In August 1971, Appellant Curtis Circulation Company (hereinafter "Curtis") entered into a written distribution agreement with Appellee Bert Randolph Sugar (hereinafter "Sugar") and a corporation which he then designated "Champion Sports, Inc." (A. 55a) but which in fact it later turned out was a non-existing corporation (A. 64a). Sugar used a number of corporate name variations containing "Champion" but it later turned out there was only one corporation bearing that name, to wit, Champion Sports Publishing Inc. (hereinafter "Champion") (A. 64a). Sugar and Champion were publishers of a number of periodicals and Curtis was, and is, engaged in the business of distribut-

ing periodicals throughout the United States and abroad. Curtis undertook to distribute a number of designated periodical titles for Champion. By the terms of the agreement Curtis advanced substantial sums of money to Champion and the agreement provided that Curtis could recoup such advances from sales of subsequent issues of the periodicals which it agreed to distribute for Champion. The agreement was for a term of five years (A. 56a).

Sometime prior to April 13, 1973, at a time when Curtis was owed substantial moneys advanced to Champion and the contract still had more than three years to run, it came to the attention of Curtis that without notice to it, all of the periodicals which were the subject of the distribution agreement had purportedly been sold to third parties. The purported seller was a corporation known as Wrestling Revue, Inc. (hereinafter "Wrestling"). One of the purported vendees was a Canadian corporation (A. 45a).

Upon further investigation, Curtis ascertained that no consideration had been paid to Champion for such purported sales but that the consideration therefor had been paid or was payable to Wrestling (A. 43a). Curtis also determined that the controlling stockholder of Wrestling as well as Champion was Sugar and that representations had been made to the vendees of the periodicals which were the subject of the distribution agreement that Champion had never really been the owner of such periodicals but that it had a mere license to publish the same which had been issued by Wrestling, the claimed owner (42a-43a).

Neither the alleged license nor the alleged ownership by Wrestling had ever been disclosed to Curtis (43a), if such representations were indeed true, and Sugar had represented to Curtis that he through Champion was the owner of such periodicals (A. 43a, 55a). It became apparent to Curtis that Sugar had either engaged in fraud at the inception of the distribution agreement and/or had en-

tered into a fraudulent scheme thereafter, using Wrestling and Champion, two corporations controlled by him, and purported licenses running from Wrestling to Champion, for the illegal purpose of effectually avoiding the distribution agreement, depriving Champion of all of its assets, and depriving Curtis of the security to which it was entitled under the distribution agreement, *viz*, the ability to recoup advances from future issues of periodicals owned by Champion and distributed by Curtis (41a-46a).

When Sugar and Champion, through their attorneys, were confronted with the facts uncovered in the Curtis investigation, they would give no satisfactory explanation or make any arrangements to pay, or secure payment, to Curtis of the moneys already advanced. As the periodicals had already been removed from Champion and consideration therefor, to the extent it already had not been paid, would flow to Sugar through Wrestling, Curtis had to act promptly to arrest the continued flow and dissipation of assets belonging to Champion to which Curtis was entitled to look as a matter of law and particularly under its distribution agreement with Champion and Sugar.

Sometime prior to April 13, 1973 Curtis applied to a Justice of the New York Supreme Court, New York County, for an order of attachment pursuant to CPLR § 6201, Subparagraphs (4), (5) and (8) (A. 41a *et seq.*). Pursuant to the statute, CPLR 6212, Curtis submitted an evidentiary showing by affidavit (A. 41a) and documents (A. 55a, 58a) of the grounds for the attachment, particularly showing the facts described herein and also submitted the required statutory bond. The application was made *ex parte*. One of the attorneys for Curtis appeared before Appellant Justice Sidney A. Fine who reviewed the papers and interrogated said attorney and thereafter issued an order of attachment on April 13, 1973 (A. 39a). The application was made on three alternative grounds all involving elements of fraud and deceit. One

ground was based on CPLR 6201, Subparagraph (4):

> "the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts."

The second ground was based on Subparagraph (5):

> "the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability."

The third ground was based on Subparagraph (8):

> "there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit."

The application of Curtis was also accompanied by a verified complaint (A. 47a) stating, *inter alia,* a cause of action for fraud and deceit, the evidentiary facts of which were presented in the affidavit submitted upon the application for the attachment as required by New York law.

On April 16, 1973, the Sheriff of the City of New York made a levy upon the moneys held by National Sports Publishing Corporation, which were the purported consideration for purported sales to it by Wrestling of periodicals which were the subject of the distribution agreement between Curtis and Champion (A. 78a).

On January 3, 1974, Appellees herein commenced this action in the United States District Court, Southern District of New York, to enjoin the enforcement of the statute under which such attachment was issued and for a declaration of the unconstitutionality of such statute (A. 1a, 4a). At the time that this action was commenced, the state action in which the attachment had issued had been pending since April 13, 1973. The summons and complaint were served on April 18, 1973 and issue was joined on

April 27, 1973. Pretrial discovery proceedings were in progress. Appellees never challenged the attachment in the state court.

On October 17, 1974, the three-judge court convened to hear and determine Appellees' constitutional challenge rendered its opinion in which it declared to be unconstitutional New York Civil Practice Act and Rules §§ 6201 Subparagraphs (4), (5) and (8) and 6211 (A. 2a, Jur. App. 1a).

Judgment granting a permanent injunction against enforcement of the statute and declaring the same to be unconstitutional was rendered by the court under date of November 1, 1974 (Jur.App. 31a) and such judgment was entered with the clerk of said District Court on November 6, 1974 (A. 3a). The judgment included a stay of the operation of the judgment until determination by, or order of, this court.

The New York Statute Under Attack. At issue is the constitutionality of the New York attachment statute, Article 62 of the Civil Practice Law and Rules, particularly whether such statute meets the test of procedural due process under the Fourteenth Amendment of the United States Constitution.

Insofar as the substantive grounds for the attachment involved in this case are concerned, Section 6201, subdivisions 4, 5 and 8, have been placed under attack. Subsection 4 specifically involves acts or contemplated acts by a defendant to defraud his creditors by placing his assets beyond the reach of such creditors. Subsections 5 and 8 involve a defendant who has already evidenced a propensity to engage in acts of fraud and deceit, with respect to whom it can be reasonably anticipated that fraud may be committed, particularly the removal of assets from the reach of the plaintiff to avoid payment of any judgment resulting from a lawsuit. (See convening decision, Jur.App., 28a.) Curtis, in the state

action, moved for an attachment under all three subsections and the order was granted upon all three subsections. Accordingly, the constitutionality of any one of said sections would suffice to uphold the State Court attachment.

The salient procedural sections of Article 62 are the following:

> CPLR 6212(a) requires that an application for an order of attachment, which must be made to a judge, be supported by an affidavit and other written evidence showing that there is a cause of action and that one or more grounds for attachment exist.
>
> CPLR 6212(b) requires that the application be supported by an undertaking in an amount fixed by the court, a specified part of which is conditioned that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the attachment in the event it is determined plaintiff was not entitled to an attachment.
>
> CPLR 6212(c) requires that all papers upon which an order of attachment is made and the summons and complaint must be filed within ten days after the order is granted.[1] Failure to file, as prescribed renders the attachment order invalid.
>
> CPLR 6212(d) provides that immediately after a levy has been made the defendant may demand of the plaintiff all papers supporting the attachment and the levy and the same must be served upon the defendant not more than one day after such demand.

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[1] While the statute by its terms does not so specifically require, the papers submitted to the court upon an application for an attachment, at least in New York County, must be accompanied by the summons and complaint in the action. While the statute imposes upon the plaintiff the obligation of filing of papers within ten days after the order is issued, as a matter of practice, at least in New York County, all papers including the summons and complaint, are filed by the Clerk of Special Term, Part II within a day or two after the order is granted.

CPLR 6221 provides that at any time prior to the application of the property to the satisfaction of a judgment any interested person may commence a special proceeding against the plaintiff to determine the right of adverse claimants to the property.

CPLR 6222 provides that a defendant can at any time obtain possession of the property by giving an undertaking equal to the value of the property.

Finally, CPLR 6223 provides that at any time prior to the application of the property to the satisfaction of the judgment, the defendant, the garnishee or any person having an interest in the property may move for an order vacating or modifying the order of attachment. *Also,* the section provides that a defendant who has appeared in the action can move to vacate the attachment upon a showing that the property is unnecessary to the security of the plaintiff.[2]

Summary of Argument

The lower court's decision to declare the New York attachment statute unconstitutional is founded upon a number of serious errors. First, the decision appears to be founded primarily upon a misreading of the statute itself. While the statute specifically provides for the right to immediate hearing post-seizure on *any* ground posited by the defendant, the lower court apparently was not aware of this circumstance and read the statute to permit a hearing only on the question whether the property attached was neces-

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[2] This "unnecessary security" ground for vacating an attachment is an *additional* ground. Under CPLR 6223 a defendant has the general right to move to vacate an attachment and to show that plaintiff does not have grounds therefor or does not have a cause of action. The decision of the three-judge court below (Jur. App., 9a) completely misapprehended the language of CPLR 6223 and the pole of its decision was that the unnecessary security test is the *sole* ground for vacating an attachment. See discussion at Point I.C., *infra.*

sary to secure the plaintiff. Second, the lower court was in error in its reading of the state judicial decisions applying the statute and particularly in its conclusion that the burden of proof is on the defendant rather than the plaintiff. Third, the lower court's reading of *Mitchell* v. *W. T. Grant*, 416 U.S. 600 (1974) as declaring that a *sine qua non* of due process is the existence of a vendor's or similar possessory lien does not appear warranted either by the rationale of that decision or the Court's most recent decision in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, —— U.S. ——, 43 L.W. 4192, decided on January 22, 1975. Fourth, the lower court's reading of *Mitchell*, as prohibiting the issuance of attachments based on fraud does not appear warranted under the rationale of *Mitchell* and, with respect to fraudulent disposal of assets, does not take into account one of the specific exceptions enunciated in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

I.A—State *ex parte* prejudgment seizure statutes antedate the enactment of the United States Constitution. Such statutes remained inviolate until *Sniadach* v. *Family Financing Corp.*, 395 U.S. 337 (1969), which carved out a special exception to the long standing law that *ex parte* prejudgment seizures were consistent with due process even if the writ issued without any supporting affidavit or the posting of a bond and where the defendant's right to a hearing was postponed to the plenary trial. In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), this Court appeared for the first time to depart from the pre-existing law and indicated that the general rule might require prior hearing and notice in order to satisfy due process in prejudgment seizure cases although it remained unclear from *Fuentes* whether prior hearing would be required if the procedure was judicially supervised and the right to a speedy hearing and other procedural safeguards provided. Also, *Fuentes* enumerated several exceptions which would not require prior hearing including activity by the debtor to secrete or otherwise place beyond the reach of the creditor assets required to satisfy a judgment.

In *Mitchell,* the Court held that prior hearing and notice were not required if the statutory scheme included judicial supervision, an immediate right to a hearing and other procedural safeguards. The Louisiana statute under consideration in *Mitchell* bears a striking resemblance to the New York statute, albeit the particular facts in *Mitchell* involve a vendor's lien rather than a writ based on fraud as is involved in this case. That this Court did not intend a vendor's lien to be a *sine qua non* of due process, appears clear both from the rationale of *Mitchell* and from the absence of any reference to the requirement of a vendor's lien in *North Georgia.*

I.B—A section by section comparison of the statute upheld in *Mitchell* and the New York statute under attack demonstrates that the New York statutory scheme is at least as protective of the debtor as the Louisiana procedure—and, indeed, in many respects, more so.

I.C—The cornerstone upon which the lower court based its declaration of unconstitutionality of the New York statute is an entirely erroneous reading of the statute *per se.* The lower court found that the "sole basis" for vacating an attachment in New York is the demonstration that the property attached is "unnecessary to the security of the plaintiff". That this is an egregious misreading of the statute is demonstrated on the statute's face, by its legislative history and by judicial decisions applying the statute. Far from being the sole basis, it is an additional basis (not provided by the Louisiana statute), applicable primarily when a personal appearance is made by the defendant after *in rem* jurisdiction has been acquired by virtue of the attachment. The statute clearly permits a motion to vacate the attachment on *any* ground the thrust of which is to show that plaintiff does not have a cause of action or does not have a statutory basis for the attachment or both. The lower court's misapprehension of the statute

pervades its decision and leads it into further error in its analysis of New York decisions applying the statute.

I.D—Both the New York statute by its terms and the judicial decisions applying such statute place the burden of proving both the existence of a cause of action and grounds for the attachment squarely upon the plaintiff. The lower court's conclusion that the burden rests on the defendant appears to be based upon confusion between "burden of proof" and "burden of going forward". In New York the plaintiff has the initial burden of going forward in the proof of a *prima facie* case sustaining his cause of action and the grounds for the attachment and only then does the defendant have the burden of going forward.

I.E—The lower court's holding that "the merits of the action are irrelevant" on the preliminary hearing in New York has no basis in any New York decisions. The New York decisions *do* hold that the ultimate merits of the controversy cannot be resolved on the preliminary hearing. This is equally true in Louisiana. Indeed, to hold otherwise would require an immediate plenary trial rather than a preliminary hearing.

II—In a most narrow reading of *Mitchell,* the lower court in effect held that the existence of a vendor's or similar possessory lien is a *sine qua non* of due process in prejudgment seizure cases. Such a sweeping holding results in the destruction of all other grounds for prejudgment seizure, a result hardly intended or contemplated in *Mitchell* which sought constitutional accommodation and flexible procedures in prejudgment seizure cases. The recent decision in *North Georgia,* in which no vendor's lien was involved, did not even remotely suggest that a vendor's lien was relevant, no less crucial, to due process. The Georgia statute was declared unconstitutional because there was no judicial supervision and no right to a hearing short of the plenary trial itself.

III—The lower court's holding that fraud is "ill-suited" for preliminary determination in effect destroys all prejudgment seizures grounded on fraud. This holding again denies the principles of "constitutional accommodation" and "flexibility of procedures" enunciated in *Mitchell.* Whether proof in a vendor's lien case is always more facile than proof of fraud is seriously open to question. Assuming that fraud is more difficult to prove, this is hardly a basis for declaring that a state cannot devise appropriate procedures to protect its citizens against fraudulent or quasi criminal activities. Both the scheme of the New York statute and the judicial decisions applying the statute are zealously protective of the rights of a debtor, particularly when the grounds for attachment are based upon fraud. One of the explicit exceptions enunciated in *Fuentes* is a case which involves fraudulent concealment or disposition of assets required to satisfy a judgment.

The New York statutory scheme requires judicial supervision over prejudgment seizure cases from the very inception of the procedure. It affords the right to immediate hearing post-seizure and a broad spectrum of safeguards designed to protect the debtor. The New York courts have been zealous in preserving and scrupulously enforcing those safeguards. Under the decisions of this Court, the New York statute is a most laudable model of due process under the Fourteenth Amendment to the United States Constitution.

It is respectfully submitted that to declare the New York statute unconstitutional would be to violate the spirit as well as the letter of the constitutionally proscribed restriction upon the power of this Court so eloquently set forth by Mr. Justice Douglas in *Fuentes:*

> "The question is not whether the [state] law is a wise law or unwise law. Our concern is not what philosophy [the state] should or should not embrace . . . .

We do not sit as a super-legislative body. In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment." 395 U.S. 337, 339.

ARGUMENT

POINT I

Due process of law is realized by the procedure of the New York attachment statute; it achieves a constitutional accommodation of the conflicting interests of the parties.

A. Prejudgment Seizures, *Ownbey* v. *Morgan* (1921) through *North Georgia Finishing Inc.* v. *Di-Chem, Inc.* (1975).

Statutes providing for *ex parte* prejudgment seizures were in existence in the colonies prior to the enactment of the United States Constitution. See *McInnes* v. *McKay*, 127 Me. 110, 114 (1928). They continued in existence thereafter and proliferated as additional states entered the Union. Their validity was not contested before this Court until 1921. In a series of cases, *Ownbey* v. *Morgan*, 256 U.S. 94 (1921), *Coffin Brothers* v. *Bennett*, 277 U.S. 29 (1928) and *McKay* v. *McInnes*, 279 U.S. 820 (1928), the Court reviewed challenges to prejudgment *ex parte* seizure statutes based upon the due process clause of the fourteenth amendment of the United States Constitution.

In these cases, the Court upheld the constitutionality of *ex parte* attachment statutes where application for the same was not supported by any affidavit or the posting of a bond and where the defendant's right to a hearing was postponed to the plenary trial of the action. The precedents established in these three cases remained in-

violate until the coming of this Court's decision in *Sniadach* v. *Family Financing Corp.*, 395 U.S. 337 (1969), wherein the Court declared unconstitutional a Wisconsin statute which permitted the issuance of a writ without prior notice to the debtor. While some viewed *Sniadach* as a radical departure from the law as enunciated in *Ownbey, Coffin* and *McKay,* the decision itself clearly evinced a disinclination to depart from the prior line of decisions and to restrict the ruling in *Sniadach* to the unique and limited facts presented to the Court in that case. Thus, the Court specifically stated:

> "A procedural rule that may satisfy due process for attachments in general, see McKay v. McInnes, 279 U.S. 820, 73 L.Ed. 975, 49 S. Ct. 344, does not necessarily satisfy procedural due process in every case." 395 U.S. 337, 340.

Further evidence that the Court in *Sniadach* intended no more than to carve out a narrow exception to its previous decisions upholding *ex parte* prejudgment seizures was its statement:

> "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." (page 340)

In *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), decided more than half a century after *Ownbey,* it appeared that the narrow exception carved out by *Sniadach* could become the general rule. In declaring unconstitutional the Florida and Pennsylvania statutes brought under review in *Fuentes* and a companion case, the Court indicated that prior notice and hearing might generally be required although it recognized a number of instances in which prior notice and hearing would not be required. While much of the language in *Fuentes,* unlike *Sniadach,* might have portended radical departure from the earlier decisions of this Court, the specific statutes before the Court in *Fuentes* were notably

lacking in procedural safeguards protective of a debtor. Thus, the Court stated:

> "The statutes, moreover, abdicate effective state control over state power. Private parties serving their own advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the Court on these matters. The state acts largely in the dark." (page 93).

Except for those instances declared by *Fuentes* not to require prior notice and hearing, that decision left unanswered whether prior notice and hearing are prequisites of due process—or whether a statute providing for *ex parte* writs satisfies due process if it provides procedural safeguards which were so obviously lacking in the Florida and Pennsylvania statutes.[3]

The Court provided the answer in *Mitchell* v. *W. T. Grant Company,* 416 U.S. 600 (1974). In *Mitchell* the Court squarely held that prior notice and hearing is not a *sine qua non* of due process in prejudgment seizure cases, stating at page 611 of the opinion:

> "The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity

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[3] This action was commenced in the Court below after the decision in *Fuentes* and before the decision in *Mitchell.* The entire thrust of the complaint in this action was directed to the circumstance that the attachment issued *ex parte.* After *Mitchell* was decided, the appellees abandoned their original position and shifted to the position that the New York statute does not provide the procedural safeguards required by *Mitchell.*

given for ultimate judicial determination of liability is adequate.' "

The emphasis which *Fuentes* had placed upon prior notice and hearing was in *Mitchell* placed upon the ability to procure a speedy hearing after seizure, judicial supervision of the procedure and the other procedural safeguards afforded to the debtor.

The Court upheld the Louisiana statute, which permitted *ex parte* prejudgment seizures, upon finding that a post-seizure hearing could be speedily obtained by the debtor, that the nature of the hearing was adequate to satisfy due process and that other procedural safeguards provided in the statute effected a constitutional accommodation of the respective interests of the parties to the litigation. The decision clearly did not require that a statute contain all of the provisions contained in the Louisiana statute in order to satisfy due process, nor did it rigidly assert that due process required the same procedures which the Court held had passed constitutional muster in the case before it. Thus, the Court stated at page 610 of its opinion:

> "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710 (1945). Due process of law guarantees 'no particular form of procedure; it protects substantial rights.' *NLRB* v. *Mackay Co.*, 304 U.S. 333, 351 (1938). 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961); *Stanley* v. *Illinois*, 405, U.S. 645, 650 (1972). Considering the Louisiana procedure as a whole, we are convinced that the State has reached a constitutional accommodation of the respective interests of buyer and seller."

Hence, while it is not necessary to demonstrate that the New York statute under review on this appeal is on all fours with the Louisiana statute upheld in *Mitchell*, it is nevertheless patently clear that there is a striking resemblance between the two statutes.[4]

The most recent decision of this Court on prejudgment seizure is *North Georgia Finishing, Inc.* v. *Di-Chem Inc.*, —— U.S. ——, 43 L.W. 4192, decided on January 22, 1975, wherein a Georgia garnishment statute was declared unconstitutional. While *North Georgia* evinced a disinclination to follow literally the law as interpreted in *Ownbey*, *Coffin* and *McKay*, which permitted *ex parte* prejudgment seizures without judicial supervision and without the opportunity for a hearing until a plenary trial, the Georgia statute under review furnishes little of precedential value on this appeal.

Under the Georgia statute the state surrendered to the plaintiff complete control over the procedure for obtaining and maintaining a seizure of defendant's property from inception to final judgment on the merits. The statutory scheme was entirely lacking in controls, judicial supervision or input and there was no provision for preliminary hearing or any opportunity for the defendant to vacate the writ (unless he posted a bond as substitute security, Ga. Code Ann. § 46-401).

While the Georgia statute *per se* has little, if any, precedential value, the decision in *North Georgia* elucidates the procedural safeguards with which this Court was most concerned in *Mitchell*, *viz.*: that there be judicial supervision of the proceeding from inception; that there be an initial showing of grounds for seizure presented for judicial review; and that there be provision for immediate

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[4] The opinion convening the three-judge court (Jur.App. 29a) noted a "striking resemblance" between the two statutes. The opinion of the three-judge court (Jur.App. 7a) asserts "There is no doubt . . . there are substantial parallels between the pertinent CPLR provisions and Louisiana provisions upheld in Mitchell. . . ." The statutes are compared in detail at Point I, B, *infra*.

hearing post-seizure. Thus, the Court in *North Georgia*, in comparing the Georgia statute to the Louisiana statute, stated with respect to the latter:

> "The writ, however, was issuable only by a judge upon the filing of an affidavit going beyond mere conclusory allegations and clearly setting out the facts entitling the creditor to seek sequestration. The Louisiana law also expressly entitled the debtor to an immediate hearing after seizure and to disssolution of the writ absent proof by the creditor of the grounds on which the writ was issued." (43 L.W. 4192 at p. 4194).

Immediately following the foregoing quoted observation, the Court held:

> "The Georgia garnishment has none of the saving characteristics of the Louisiana statute."

It is respectfully submitted that the New York statute has all of the saving characteristics of the Louisiana statute—and more.

B. The New York Statute Is at Least as Protective of the Debtor as the Louisiana Statute.

Inherent in the concept of "constitutional accommodation" of the conflicting interests of the parties enunciated in *Mitchell* is the corollary that there is a broad spectrum of statutory schemes which will satisfy due process. The Georgia statute was held to be without that spectrum. The New York statute appears to be clearly within the spectrum; indeed, as it happens, the statutory scheme in New York is practically identical to the Louisiana procedure.

With respect to the grounds for obtaining a writ the Louisiana statute requires a showing by the creditor that "it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." (Art. 3571, *Mitchell*, p. 623; *cf.* CPLR 6201(4), (5) and (8), Jur. App. 38a, 39a).

With respect to safeguards provided for the debtor, the Louisiana statute provides:

(a) That the grounds for attachment appear from specific facts shown by verified petition or affidavit (Art. 3501, *Mitchell*, p. 621; *cf.* CPLR 6212(a), Jur. App. 41a);

(b) By contradictory motion the defendant can obtain dissolution of the writ unless plaintiff proves the grounds upon which it issued (Art. 3506, *Mitchell*, p. 622; *cf.* CPLR 6223(a), Jur. App. 48a);

(c) The Court can allow damages for the wrongful issuance of a writ including attorneys' fees (Art. 3506, *Mitchell*, p. 622; *cf.* CPLR 6212(b), Jur. App. 41a);

(d) The defendant can release the property by posting security for the satisfaction of any judgment which might be rendered against him (Art. 3507, *Mitchell*, p. 622; *cf.* CPLR 6222, Jur. App. 48a);

(e) The plaintiff has to furnish security in an amount fixed by the Court sufficient to protect the defendant against damage resulting from a wrongful issuance of the writ (Art. 3574, *Mitchell*, p. 623; *cf.* CPLR 6212(b), Jur. App. 41a);

(f) The defendant can effect a release of the property by furnishing security exceeding by one-fourth the value of the property or the amount of the claim, whichever is lesser (Arts. 3507, 3508, *Mitchell*, p. 622; *cf.* CPLR 6222, Jur. App. 48a);

The "striking resemblance" (Jur. App. 29a) and "substantial parallels" (Jur. App. 7a) between the Louisiana and New York statutes are manifest. Indeed the New York statute is considerably more responsive to due process.

(a) With respect to the grounds for attachment, the practice under, as well as the letter of, the New York statute requires a compelling showing by affidavit and other

written evidence that sufficient grounds exist.[5] In Louisiana, while a cursory reading of the statute appears to require such a showing, in fact and in practice a standardized form is used to meet the requirements of an affidavit, pro forma allegations are sufficient and the judge's review in effect is restricted to determining whether the allegations are formally sufficient. (See dissent of Justice Stewart in *Mitchell*, p. 629). Moreover, the ground for the writ is *presumed*, rather than demonstrated, as the statutory ground only requires that the goods be "within the power of the defendant to conceal," etc., this being automatically the result if the defendant is in possession. The Louisiana statute does not require any showing of the likelihood that the defendant will conceal, etc. (See *Mitchell* majority decision, fn. 4, at p. 605).

(b) With respect to procedural safeguards, the New York statute contains all of the safeguards appearing in the Louisiana statute—and more, e.g., the defendant can also have the attachment vacated upon a showing that the property is unnecessary to the security of the plaintiff (CPLR 6223).

In short, a comparison of the Louisiana and New York statutes makes it apparent that the two are identical for purposes of applying the tests enunciated in *Mitchell*. Indeed, the appellees (after the decision in *Mitchell* was

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[5] There are no standardized forms and the plaintiff must show by an affidavit and other written evidence that the particular facts in his case require attachment pursuant to the statute. The papers are submitted to a judge for review and the order is sometimes denied and sometimes granted. Frequently additional proofs are requested by the Court before the order is granted. In this very case, after Curtis submitted its papers in support of the application of the attachment, its attorneys were asked to attend in the chambers of Justice Sidney A. Fine where Justice Fine further reviewed the papers with counsel and determined to increase the amount of security—and only then, did he sign the order. CPLR 6211 provides "an order of attachment *may* be granted without notice . . ." The judge exercises judicial discretion whether it should be granted without notice. The pro forma allegations required for the Louisiana writ in effect reduce judicial discretion to a ministerial act.

rendered) never argued that the New York statute *per se* failed to provide due process. Rather, they argued that *application* of the statute by the New York courts resulted in a denial of due process. While the opinion of the three-judge court took but one section of the statute (CPLR 6223) to task, its critique of that section was based on a demonstrable misapprehension of its language.

C. The Crux of the Decision Below Is Based Upon a Misapprehension of CPLR 6223.

In Part III of its decision (Jur. App. 7a), the three-judge court found that the New York statute paralleled the Louisiana statute with the exception that the type of hearing afforded under the Louisiana statute was not afforded by the New York statute. In Part IV of the decision (Jur. App. 8a), the three-judge court stated the basis for the purported distinction, *viz.:*

> "The sole basis for vacating the attachment under the CPLR *is not* that the grounds upon which it has been issued are unproven but rather that the attachment 'is unnecessary to the security of the plaintiff'." (Jur. App. 9a)

That erroneous premise is the cornerstone of the decision of the three-judge court. That the premise is erroneous is demonstrable from a reading of CPLR 6223 *per se,* its legislative history and judicial decisions dealing with that section.

The language of CPLR 6223 demonstrates the quoted ground to be an *additional and alternative* ground not an exclusive one. The entire sentence in which the language occurs makes it plain that this additional ground is designed primarily for a defendant who submits himself to the personal jurisdiction of the court after an action has been started by attachment primarily to obtain *in rem* jurisdiction. While the lower court's decision states that the quoted language has been interpreted by the New York courts for some fifty years, the fact of the matter is that the language was only added to the section some twelve years ago when the then New York Civil Practice

Act was repealed and replaced by the present New York Civil Practice Law and Rules. See, *Supplementary Practice Commentary, McKinney's,* CPLR 6223, Cumulative Pocket Part p. 47 and p. 106 of the main volume citing the *Legislative Studies and Reports* covering the addition of this provision. Except for those cases cited by the lower court dealing specifically with a motion to vacate *only* on the ground "that the attachment is unnecessary to the security of the plaintiff" (which were necessarily decided after this ground was added to the statute), all of the New York decisions cited by the lower court were decided before such language ever appeared in the statute.[6]

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[6] This misapprehension of the statute was brought to this Court's attention in the Curtis Jurisdictional Statement filed on January 13, 1975. On April 9, 1975, the New York Law Journal published a decision by Justice Silverman of the New York Supreme Court, New York County, *New York Auction Co.* v. *Belt,* p. 17, col. 3, in which Justice Silverman observed:

> "Apparently, the court in the *Sugar* case thought that [the unnecessary security ground] was the only ground for vacating an attachment. But, the legislative history makes clear that this is merely an additional ground added to the existing ground for vacating an attachment in situations where an attachment initially used to obtain jurisdiction is no longer necessary for that purpose. See Third Preliminary Report, Leg.Doc. No. 17 p. 358 (1959); cf. McKinney's Supplementary Commentary (1964) to sec. 6223 at Supp. p. 47; Data Realty, Inc. v. Sciacca (App. Term 2d Dept.), NYLJ, p. 22, col. 5 (May 18, 1970). It is the first sentence of CPLR sec. 6223 which is the successor to sections 948 and 949 of the Civil Practice Act (Sixth Report on the Revision of the Civil Act, Leg.Doc. No. 5, p. 591 (1962), and like those sections, seems to provide the defendant with a right to move to vacate the attachment on the ground that it is not authorized by the statute. . . ."

Also, on May 23, 1975 (literally when corrected proofs of this brief were about to go to press), the New York Law Journal published a decision by Justice Fein of the New York Supreme Court, New York County, *Regnell* v. *Page,* p. 14, col. 2, which makes the same observation:

> "The [three judge] court asserted that the sole basis for vacating an attachment under the CPLR is that the attachment is unnecessary to the security of the plaintiff. Such an interpretation, however, misconstrues the statute. A motion

(*footnote continued on following page*)

The lower court's error in reading the "unnecessary security" ground as the sole ground for vacating an attachment pervades its decision and is compounded by its erroneous view that juridical interpretation of CPLR 6223 by the New York courts is founded upon the same mistaken reading of that section. Thus, the lower court leads into its citation of New York decisions with the observation:

> "That this [viz., the unnecessary security ground is the sole ground] is not too narrow or literal a reading of the language of 6223 is resoundingly confirmed by numerous holdings of the New York courts." (Jur. App. 9a)

and on the same page of the decision comments:

> "Indeed, under the decisions of the New York courts, the merits of the action are irrelevant on a motion to vacate the attachment under § 6223—*a construction which we believe is proper in the light of the strictly limited wording of the law.*" (Emphasis supplied.)

In summary, the erroneous interpretation of CPLR 6223 undermines the entire rationale of the lower court decision in two broad respects, *viz.*, (1) the court was mistaken when it held that the New York statute *per se* does not afford a hearing consistent with due process[7] and (2) the court was

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(*footnote continued from preceding page*)

to vacate under CPLR 6223 on the ground that the attachment is unnecessary to the security of the plaintiff is but one of several available bases. Vacatur may be premised on the grounds, among others, that the attachment is unauthorized in the action, or that the ground for attachment relied upon is insufficient."

This decision generally takes exception to the declaration of unconstitutionality of CPLR 6223 (4), (5) and (8) by the lower court and provides a most excellent and learned analysis for its conclusion that the statute is constitutional. The entire text of the decision will be submitted as an appendix to the brief of the New York Attorney General.

[7] In *Regnell* v. *Page, supra* at fn. 6, the Court held:

"Even assuming that the prevailing case law imposes the burden on the defendant [an assumption seriously questioned by the court earlier in the decision], such rule is neither implicit in nor directed by the New York statute and therefore should not affect its constitutionality."

mistaken when it held that judicial interpretation of the statute by the New York courts was not consistent with due process. The first broad mistake is apparent from a proper reading of the statute itself. The second broad mistake, aside from the erroneous basis used by the three-judge court for analysis of the New York decisions, is apparent from the New York decisions, which are analyzed immediately below.

D. The Applicant for Attachment Bears the Burden of Proof in New York.

The lower court held "the burden of proof is not, as in *Mitchell,* on the plaintiff, but on the defendant" (Jur. App. 9a). This holding appears to be based not only upon a misreading of the New York statute but upon an apparent confusion between the broad concept of "burden of proof" and the somewhat narrower concept of the "burden of going forward".

In New York, plaintiff clearly has the burden of proving by evidentiary facts and documents that he is entitled to the order of attachment (CPLR 6212). The New York courts have consistently held that the plaintiff has the burden of proving by evidentiary facts and documents a *prima facie* case sustaining his cause of action and the grounds for attachment. *Eaton Factors Co.* v. *Double Eagle Corp.,* 17 A.D.2d 131, 232 N.Y.S.2d 901 (1962); *Maitrejean* v. *Levon Properties Corp.,* 45 A.D.2d 1020, 358 N.Y.S.2d 203 (1974); *Durkin* v. *Paten,* 97 App.Div. 139, 89 N.Y.S. 622 (1904); *J. H. Mohlman Co.* v. *Landwehr,* 87 App.Div. 83, 83 N.Y.S. 1073 (1903); *Hill* v. *Atanasio* (N.O.R.), 127 N.Y.S. 344 (1911); *Ecco High Frequency Corp.* v. *Amtorg Trading Corp.* (N.O.R.), 81 N.Y.S.2d 610 (1948), aff'd 274 App.Div. 982, 85 N.Y.S.2d 304; *Banco Agricola* v. *Jiminez Export* (N.O.R.), 97 N.Y.S.2d 437 (1950); *Favta Societe Anonyme* v. *United Kingdom Machinery Corp.,* 10 Misc. 2d 326, 167 N.Y.S.2d 287 (1957); see: *Anderson* v. *Malley,* 191 App.Div. 573, 181 N.Y.S. 729 (1920); *Abdun-Nur* v. *Arbeed,* 198 App.Div. 795, 191 N.Y.S. 38 (1921); *Makepiece* v. *Dilltown Smokeless Coal Co.,* 179 App.Div. 622, 167 N.Y.S. 83 (1917); *Gitlin* v. *Stone,* 262 F.Supp. 500 (1967).

Where the attachment is based on fraud[8] the New York courts have been most stringent in holding the plaintiff to his burden of proof. In *Eaton Factors, supra,* the court held:

> "'*Fraud cannot be inferred, it must be proved*' (*Anderson* v. *Malley,* 191 App. Div. 573, 575). *The fact that the affidavits in support of an attachment contain allegations raising a suspicion of an intent to defraud is not enough* (*Mohlman Co.* v. *Landwehr,* 87 App. Div. 83, 85); *it must appear 'that such fraudulent intent really existed in the mind of the defendants, and not merely in the ingenuity of the plaintiff'* (*Thompson* v. *Dater,* 57 Hun 316, 319). *Thus, fraud is never presumed by a mere showing of the liquidation or disposal by a debtor of its business assets* (*Nolan* v. *Workman Co.,* 146 Misc. 99, 100 and cases cited). Here, too, the appellants are not to be deemed chargeable with fraud merely because, in connection with the liquidation of the corporate trucking business, they received a substantial sum in consideration of a limited agreement by them, as individuals, to refrain from engaging in such business. And also, here, the requisite showing of a fraudulent intent on the part of the appellants is not sufficiently made out by the alleged statements of certain of them to plaintiff to the effect that they had sold 'out all of our assets' and that the plaintiff's judgment would be uncollectible. There was here no showing of a secreting or disposal of any particular assets of the appellants with intent to defraud their creditors." (p. 136) (Emphasis supplied).

In *Banco Agricola, supra,* the court held:

> "But it is not sufficient that the papers upon which the attachment was procured set out the ultimate facts showing the cause of action or the grounds. Evidentiary facts making out a prima facie case proving such

[8] All of the grounds upon which Curtis relied for the attachment in this case were based on fraud, CPLR 6201 (4), (5) and (8).

facts must be shown, Hart v. Page Mfg. Co., 187 App. Div. 296, 175 N.Y.S. 502; Lamborn v. Lake Shore Banking & Trust Co., 231 N.Y. 616, 132 N.E. 911; Makepeace v. Dilltown Smokeless Coal Co., 179 App.Div. 60, 166 N.Y.S. 92; Ecco High Frequency Corp. v. Amtorg Trading Corp., Sup., 81 N.Y.S.2d 610. To sustain the attachment the affidavit in support thereof must contain evidence from which the court can determine that the ultimate facts stated can be substantiated, Lepow v. Cervo Export Corporation, Sup., 82 N.Y.S.2d 423; Miller Bros. Const. Co., Inc. v. Thew Shovel Co., 248 App.Div. 150, 288 N.Y.S. 944. *The burden of proving fraudulent intent is for the party applying for the attachment and circumstances which may create a strong suspicion but yet fall short of prima facie proof are not sufficient,* Durkin v. Paten, 97 App.Div. 139, 89 N.Y.S. 622. *Fraud cannot be inferred, it must be proved,* Anderson v. Malley, 191 App.Div. 573, 181 N.Y.S. 729." (pp. 439, 440) (Emphasis supplied).

The New York decisions relied upon by the court below for its finding that the burden of proof is on defendant in the preliminary hearing on a motion to vacate the attachment are not inconsistent. As all of the cited decisions, both those cited herein and those cited in the opinion of the court below, were decided on defendant's motion to vacate an *ex parte* attachment issued on proofs already submitted by plaintiff, the New York decisions relied upon by the court below stand only for the proposition that the plaintiff having carried the burden of demonstrating the grounds for attachment in the first instance, on the motion to vacate, the burden of going forward shifts to the defendant.

The fact that the burden of proof in New York is on the plaintiff is easily demonstrable if we view the statutory procedure as applied to an application for attachment made by a plaintiff on prior notice and hearing, a procedure for which the statute provides as well as an *ex parte* application. If the application is made on notice, clearly Rule

6212 imposes upon the plaintiff the burden of proving a *prima facie* case warranting the attachment. The defendant's response can be in the nature of a demurrer, i.e., that no *prima facie* case has been made out, or a rebuttal. The latter approach shifts the burden of going forward to the defendant but only after the plaintiff has already carried his burden. The procedure is no different when the plaintiff makes out his *prima facie* case *ex parte* in the first instance. It is only by artificially fragmenting the *ex parte* procedure that one can appear to argue that the burden on the motion to vacate is that of the defendant. The distinction, if any, is purely formal and semantic; it is not substantive.

E. A Preliminary Hearing by its Nature Is Not Designed to Determine the Merits of the Controversy Between the Parties; Due Process Does Not Require That the Post-seizure Hearing Be a Plenary Trial of the Underlying Controversy.

Further error in the three-judge court decision is manifest in its holding:

> "Indeed under the decisions of the New York courts, the merits of the action are irrelevant on a motion to vacate the attachment . . . ." (Jur. App. 9a)

There are at least four errors in this holding.

First, the merits of the action are most emphatically made relevant by the statutory fiat of the governing section, CPLR 6212, which specifically provides, "the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that *there is a cause of action* and the one or more grounds for attachment . . ." (Emphasis supplied.) Hence, it is a statutory *sine qua non* for the issuance of an attachment that the plaintiff show *prima facie* (not just by "notice" pleading or *pro forma* allegations) that he has a—*meritorious*—action against the defendant. Quite obviously on a motion to vacate pursuant to CPLR

6223, whether such meritorious action (as well as the grounds for attachment) have been demonstrated *prima facie* by the plaintiff and can withstand rebuttal by the defendant, is a crucial issue for determination by the court.

Second, the holding is based, *inter alia*, upon the court's erroneous conclusion that the unnecessary security ground is the sole ground to vacate an attachment. This is clearly demonstrated by the Court's statement that such holding is founded upon "a construction which we believe is proper in the light of the strictly limited wording of the law" (Jur. App. 9a).

Third, we have found no New York decision which holds, states or suggests that "the merits of the action are *irrelevant*". Indeed, the three decisions cited by the three-judge court, *Kneapler* v. *Braufman*, 266 App.Div. 756, 41 N.Y.S.2d 261 (2d Dept. 1943), *Bard-Parker Co., Inc.* v. *Dictagraph Products Co.*, 258 App.Div. 638, 17 N.Y.S.2d 588 (1st Dept. 1940), and *Marklin* v. *Drew Properties Corp.*, 280 F.Supp. 176 (S.D.N.Y. 1967), in no wise hold the merits to be irrelevant. All of these decisions held that the preliminary hearing should not decide in advance the ultimate merits of the controversy, which are a matter for the plenary trial. In *Bard-Parker, supra*, the court held, "the court should not attempt to decide in advance the merits of the controversy"; in *Kneapler, supra*, the court held "The merits of the controversy may not be *determined* on this motion." (Emphasis supplied); and in *Marklin*, the court held "the court should not attempt to decide in advance the merits of the controversy."

Fourth, the circumstance that the preliminary hearing is not finally dispositive of the controversy between the parties inheres in the nature of a preliminary hearing, not only with respect to attachments or similar writs but with respect to a large number of provisional remedies long recognized and accepted by the law. While the merits of the controversy are most crucially relevant, their final

determination upon the preliminary hearing is obviously not required. Indeed, a final determination of the controversy on a preliminary hearing is a most obvious dichotomy in terms. Due process does not require final determination of the controversy on the preliminary hearing or, to put the proposition in another way, it does not require an immediate plenary trial rather than a preliminary hearing.

If there were any doubt about the matter, certainly this Court's decision in *Mitchell* put such doubt to rest. In *Mitchell,* the Court stated:

> "In our view, this statutory procedure effects a constitutional accommodation of the conflicting interests of the parties. We cannot accept petitioner's broad assertion that the Due Process Clause of the United States Constitution guaranteed to him the use and possession of the goods until all issues in the case were judicially resolved after full adversary proceedings had been completed. It is certainly clear under this Court's precedents that issues can be limited in actions for possession." p. 607.

and

> ". . . there is scant support in our cases for the proposition that there must be final judicial determination of the seller's entitlement before the buyer may be even temporarily deprived of possession of the purchased goods. On the contrary, it seems apparent that the seller with his own interest in the disputed merchandise would need to establish in any event only the probability that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit." p. 609.

POINT II

Due process does not require that the applicant for prejudgment seizure be the holder of a vendor's or similar statutory lien. The state has a clear and recognized interest in the protection of other property rights and commercial claims.

While the opinion of the convening judge in the court below (Jur. App. 29a) observed that a vendor's lien was one of the "distinctions [which] may seem slender in view of the broad language employed in parts of the Mitchell decision . . ." and felt "constrained to grant plaintiff's motion to convene a three-judge court [only] in light of the breadth of the *Goosby* holding", the subsequent decision of the three-judge court held the vendor's lien to be one of the "significant distinctions which placed the case at hand within the *Fuentes* rather than the *Mitchell* zone" (Jur. App. 10a).

As the absence of a vendor's lien is treated in the three-judge court decision as a separate ground for declaring the New York statute unconstitutional, the effect of its holding is to make the existence of a vendor's lien or other statutory possessory interest a *sine qua non* of due process in prejudgment seizure proceedings. It is respectfully submitted that this is a quite extraordinary proposition, *inter alia,* as it effectively destroys all of the other time-honored and judicially approved grounds for prejudgment seizure. The lower court's holding in this respect is entirely unsupported by *Fuentes* or *Mitchell* or *North Georgia,* most recently decided by this Court.

The court's holding that the absence of a vendor's lien "placed the case . . . within the Fuentes . . . zone" appears to be wholly unjustified as nothing in the *Fuentes* decision deals with the relationship of the existence of a vendor's lien to the satisfaction of due process. While there happened to be a vendor's lien involved in *Fuentes,* the language and the rationale of the *Fuentes* decision

is not in any regard directed to that happenstance. The rationale of the *Fuentes* decision indicates quite clearly that that Court would not have found the prejudgment seizure proceedings before it to be violative of due process if such proceedings had been judicially supervised and had provided for prior hearing and notice—whether or not a vendor's lien happened to be involved. That aspect is simply irrelevant to the *Fuentes* decision.

While the existence of a vendor's lien was concededly relevant to some of the rationale in the *Mitchell* decision, there is nothing in the *Mitchell* decision to suggest that the existence of a vendor's lien was thereafter to become a rigid, inflexible *sine qua non* of due process in prejudgment seizure proceedings. Indeed, *Mitchell* places primary emphasis on the flexibility of statutory schemes and procedures which will satisfy due process.

If there had been any possible justification for the three-judge court to read *Mitchell* as enunciating an iron-clad rule that the existence of a vendor's lien would henceforth become a *sine qua non* of due process at the time that decision was rendered, the decision of this Court in *North Georgia* would seem to have foreclosed even that remote possibility. The Georgia statute was declared unconstitutional because it lacked two basic prerequisites which *were* prescribed in *Mitchell, viz.,* there was a complete lack of judicial supervision and there was no early opportunity to be heard. The Georgia statute did not require a vendor's lien; the plaintiff in *North Georgia* did not have a vendor's lien; there is not a word in the *North Georgia* decision even mentioning a vendor's lien altho it was decided only eight months after *Mitchell.* If the Court had intended to make the existence of a vendor's lien or a similar possessory interest a *sine qua non* of due process in prejudgment seizure proceedings, one would have anticipated that the absence of that *sine qua non* in the Georgia statute would have warranted some mention by the Court in *North Georgia.*

Certainly, prior to the coming of *Fuentes, Mitchell* and *North Georgia,* the law had long recognized the legitimate interest of the state in devising procedures to assure the effective enforcement of contract claims, commercial transactions and interests in property other than vendor's liens. It would appear that these three decisions can hardly be cited for the proposition that the state can no longer devise procedures to protect such interests which will satisfy due process except in the case of a statutory possessory lien.*

POINT III

Due process does not prevent a state from devising procedures to effectively protect its citizens against fraud. If fraud issues be less amenable to easy proof than other issues, this factor is outweighed by the compelling interest of the state to discourage fraud.

Another purported distinction which the convening judge originally opined to be slender but which became a significant separate ground for the three-judge court's decision is that issues of fraud are " 'ill-suited' for preliminary ex parte determination . . ." (Jur. App. 11a).

This cryptic holding necessarily implies a great deal more than it explicitly states. It must be deduced from

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* While Curtis did not have a possessory lien, its distribution agreement with Champion gave it a specific contractual lien on the publications which were removed from Champion through the alleged sales by Wrestling to two purported vendees. The consideration for one of these purported sales was the only property upon which the sheriff levied. Also, creditors have well recognized interests in conveyances by their debtors without consideration where the debtor is insolvent or unable to make payment. See, e.g., New York Debtor and Creditor Law, § 273, *et seq.* Property upon which a sheriff levies pursuant to the New York Attachment Statute itself becomes subject to a statutory lien in favor of the creditor. As was held in *Mitchell,* "the definition of property rights is a matter of state law." 416 U.S. 600, 604.

Also, it should be noted (a) neither Curtis nor Wrestling was in possession of the property attached by the Sheriff and both asserted claims to the property based on contract and (b) possession was not acquired by Curtis but by the Sheriff who holds the property pending final plenary determination of the claims of the parties.

this holding (a) that no prejudgment seizure grounded on fraud can ever satisfy due process and (b) that this be the case whether the writ issue before or after hearing. The latter deduction appears irresistible as issues "ill-suited" for preliminary hearing are no more or less so, regardless whether the preliminary hearing is held *ante* or post-seizure. Indeed, the holding is purportedly based on *Mitchell* which dealt with a *post*-seizure hearing. The words "ex parte" in this holding of the lower court appear to be completely superfluous.

While the lower court opined that "Mitchell . . . seriously narrowed the impact of Fuentes", its prohibition of all prejudgment seizures grounded on fraud encompasses a breadth apparently never contemplated in *Fuentes* or *Mitchell*.[10]

Fuentes never dealt with the question of the facility or suitability of proof on a preliminary hearing; its entire concern was with the timing of the hearing and a fair reading of *Fuentes* clearly indicates that that Court would not have prohibited prejudgment writs grounded on fraud if notice and hearing preceded their issuance. Indeed, one of the explicit exceptions to the general approach of *Fuentes* requiring *prior* hearing was a writ issued "to guard against the demonstrated possibility that the alleged debtor will destroy or conceal disputed goods." 407 U.S. 91, 93, Cf. CPLR 6201(4).

Mitchell, on the facts presented, concededly opined that issues on a preliminary hearing pertaining to a vendor's lien "are ordinarily uncomplicated matters" (416 U.S. 600, 609), but to draw from *Mitchell* a Procrustean rule that writs can only meet the test of due process if proof on the preliminary hearing is at least as facile as the Court supposed it *ordinarily* to be in vendor's lien cases, is no more

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[10] This observation seems equally applicable to the "vendor's lien" holding of the lower court discussed at Point II, *supra*.

justified than the proposition that a vendor's lien is a *sine qua non* of due process.[11]

If fraud issues be less suited for determination on a preliminary hearing than issues raised by a vendor's lien case, then this factor should be weighed against the most compelling interest of the state in the protection of its citizens against perpetration of frauds. Civil frauds are usually based upon criminal or quasi criminal activity. The law has long recognized as basic to the police powers of a state designed to protect its citizens, the prevention of criminal and fraudulent activity.

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[11] Fraud issues are not always difficult; issues on "right to possession" are not always facile. (The ground for the issuance of a writ under Article 3571 of the Louisiana statute is the *"right to possession of property"*, Art. 3571, 416 U.S. 600, 623, and not the existence of a vendor's lien and default by the buyer as the statute is paraphrased in the *Mitchell* decision and in the opinions of the court below.) What if Mr. Mitchell had supported his motion to dissolve the writ with evidence showing that the refrigerator, range and washing machine were inoperable; that despite innumerable demands made upon Grant, it refused to take any steps to replace or repair these items; that he was compelled to retain several different mechanics on several occasions in an attempt to make these items operable; that their attempts were only partially successful and that the amounts he was required to pay such mechanics far exceeded any indebtedness owed to Grant. Would the proof required to determine Grant's "right to possession of [the] property" be so readily established? *Cf.* Discussion in *Mitchell* of the ground in the Florida replevin statute that the goods be "wrongfully detained" with respect to which it observed: "This broad 'fault' standard is inherently subject to factual determination and adversarial input." (416 U.S. 600, 617.) It is also to be noted that if the grounds for the issuance of a writ in Louisiana *are* more amenable to proof than they are in New York, this is at least partially the result of the fact that the Louisiana statute presumes, without the requirement of proof, one of the grounds for the attachment, i.e., that the property may be secreted or dissipated; the New York statute makes no such presumption. Also, if *prima facie* evidence of a lien and a default are all that are preliminarily required in Louisiana, this does not render facile the question of the right to possession; rather, it narrowly restricts the scope of the preliminary hearing. The right to possession, and all issues which may be brought to bear on *that* subject, is reserved for plenary trial.

The New York courts have not been cavalier in their treatment of applications for attachment based on allegations of fraud. They have most zealously guarded the rights of the debtor where fraud is the ground of the application. *Eaton Factors Co.* v. *Double Eagle Corp.*, 17 A.D.2d 131, 232 N.Y.S.2d 901; *Maitrejean* v. *Levon Properties Corp.*, 45 A.D.2d 1020, 358 N.Y.S.2d 203; and *Banco Agricola* v. *Jiminez Export* (N.O.R.), 97 N.Y.S.2d 437.

If determination of fraud issues on a preliminary hearing is more difficult than the determination of vendor's lien issues, this should not furnish a basis for denying the citizens of a state procedures to effectively prevent or discourage fraud. *Mitchell* reaffirmed that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginative situation" (416 U.S. 600, 610). The New York statute and judicial decisions most manifestly appear to realize an appropriate accommodation between interests of its citizens in preventing fraud and the interests of the perpetrator or putative perpetrator of fraud.

Fraudulent secretion or disposition of assets. While *Fuentes* seemed to generally require prior hearing, it nevertheless set forth some specific exceptions. 407 U.S. 67, 91, 93. One of those exceptions was the issuance of an *ex parte* order "to guard against the demonstrated possibility that the alleged debtor will destroy or conceal disputed goods". The court below found this exception to be inapplicable to the case at hand (fn. 5 to the lower court's decision, Jur. App. 14a). There is no indication of the lower court's *rationale* in reaching this determination. One can only conjecture that the lower court reads the words "disputed goods" most narrowly so that other forms of property are not to be considered within the exception enunciated in *Fuentes*. More specifically, the lower court did not view the proceeds of the purported sales of the publications in which Curtis had a contractual security interest as analogous to, or falling within, the "disputed goods" exception enunciated in *Fuentes*.

One of the three subparagraphs of CPLR 6201 upon which the order of attachment was grounded by the state court, subparagraph (4), is that:

> "The defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of those acts."

Hence, the lower court has in effect held that statutes permitting prejudgment seizure based upon a showing that the defendant with fraudulent intent is secreting or disposing of his assets cannot satisfy due process, as no preliminary hearing can adequately determine such issues.

This holding apparently not only flies in the face of the "flexibility" and "constitutional accommodation" approaches of *Mitchell* but also appears to violate one of the specific exceptions enunciated in *Fuentes*.

Conclusion

The New York attachment statute provides for judicial supervision throughout the procedure. It affords the opportunity for immediate hearing and other procedural safeguards which are more than adequate to satisfy due process under the decisions of this Court. Under the statute and the judicial decisions applying the statute, the burden of proof is upon the plaintiff and the interests of the defendant are zealously guarded. The statutory scheme satisfies due process. The decision below should be reversed.

Respectfully submitted,

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